

2014

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OSGOODE HALL LAW SCHOOL

LEGAL STUDIES RESEARCH PAPER SERIES

Research Paper No. 3/2014

Vol. 10, No. 3 (2014)

Equally Recognized? The Indigenous Peoples of Newfoundland and Labrador

Forthcoming in Osgoode Hall Law Journal, Vol. 51, No. 2 (2014)

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Editors:

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Comparative Research in
Law & Political Economy



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Abstract:

In Canada, certain indigenous groups are struggling to obtain official recognition of their status and rights. This is particularly so in Newfoundland and Labrador, where the authorities took the stance, when the province joined Canada in 1949, that no one would be legally considered indigenous. This paper analyzes the claims of the indigenous groups of that province, which have resulted, over the last 30 years, in various forms of official recognition. In particular, it highlights how the concept of equality was used by those groups to buttress their claims. Equality, in this context, was mainly conceived of as “sameness in difference,” that is, the idea that an unrecognized group claims to be treated consistently with other groups that share the same culture or identity and that are already recognized. Such assertions may be made in the context of human rights litigation, but also through joining or leaving associations or federations of indigenous groups. Through that process, unrecognized indigenous groups of the province indicated to whom they wished to be compared and, in doing so, they ironically reinforced the hierarchy of statuses recognized under Canadian law.

Keywords:

Aboriginal peoples, equality, recognition, assimilation, colonization, Newfoundland and Labrador

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Equally Recognized? The Indigenous Peoples of Newfoundland and Labrador

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This article will be published in the next issue of the Osgoode Hall Law Journal (51:2).

January 2014

Introduction

Section 35(2) of the *Constitution Act, 1982* states that the “aboriginal peoples of Canada,” to whom aboriginal and treaty rights are recognized, “includes the Indian, Inuit and Métis peoples of Canada.” In this regard, Newfoundland and Labrador is remarkable because in 1982, none of its indigenous peoples had any form of legal recognition, while today groups in the province have gained official recognition under each of the three categories. Recognition, in this context, means the ascription of a separate legal status based on ethnic identity by a branch of the state (Parliament, the executive or the judiciary), usually triggering specific rights applicable only to the members of the group so recognized. Thus, since 1982 the federal government has signed a treaty with the Labrador Inuit Association, created bands and reserves for two Innu communities in Labrador as well as for the Miawpukek band and created the “landless” Qalipu band encompassing all Mi’kmaw people (other than the Miawpukek members) on the Island. Meanwhile, the claims of the Labrador Métis Nation have been partially validated by the courts.

The aim of this paper is to trace the use of the concept of equality in the discourse concerning the recognition of Newfoundland and Labrador’s indigenous peoples. It may seem counter-intuitive to speak of equality as the basis for the separate legal and political treatment of the indigenous peoples, as the idea of equality – at least in its formal sense – suggests that the same rules must be applied to everyone. Thus, the specific rights of the indigenous peoples have often been contrasted to the universal ideals that undergird the right to equality.¹ And indeed, it was in the name of equality that no special status was afforded to the indigenous peoples of Newfoundland upon union with Canada in 1949. Yet, richer conceptions of equality require that a different treatment be offered to individuals or groups who find themselves in a disadvantaged position.² Substantive equality then becomes a claim for the recognition of difference rather than a claim for consistent treatment.³ Such a conception of equality has often been mentioned as one possible justification for the specific rights granted to the indigenous peoples.⁴

Given the governments’ initial refusal to recognize the existence of indigenous groups in the province, Newfoundland and Labrador provides a unique case study of a framework for the recognition of indigenous groups that is built from scratch in an era where equality has become a cardinal legal and political value. To be sure, we do not assume that the motivation of the federal government (or any other actor for that matter) was to achieve greater equality. Nevertheless, as we shall see below, equality played a central role in the justification of claims for recognition. Arguably, government responses

¹ See, e.g., *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 534.

² For a general survey, see William B. Griffiths, “Equality and Egalitarianism: Framing the Contemporary Debate” (1994) 7 Can. J. of Law and Jur. 5.

³ Michel Rosenfeld, “Equality and the Dialectic between Identity and Difference” in Omid Payrow Shabani, ed., *Multiculturalism and Law: A Critical Debate* (Cardiff: University of Wales Press, 2007); see also Danièle Lochak, *Le droit et les paradoxes de l’universalité* (Paris: P.U.F., 2010).

⁴ See, e.g., Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

to such claims were also informed by equality-related considerations, at least to the extent that the government must publicly justify its policies in such a way that does not make it look like similar groups are treated differently and to the extent that it is faced with the prospect of court rulings invalidating laws or policies that are contrary to the right to equality. Thus, equality is at once a powerful tool and a powerful constraint. Yet, when we look today at the (almost) final result of these struggles for recognition, we do not find a single set of rules (equally) applicable to all indigenous persons in the province, but rather a patchwork of statuses and bundles of rights that differ from group to group. As we shall see below, this is arguably the result of a combination of assertions of sameness and difference by the groups concerned and of the practical way these assertions play out in the political arena.

In Part I of this article, I explain how unrecognized indigenous peoples can use the right to equality, in its substantive conception, to articulate their claims for recognition as claims for “sameness in difference.” In Part II, I describe the indigenous groups of Newfoundland and Labrador and indicate how, in the years after Confederation, formal equality was used to justify their non-recognition. In Part III, I analyze how each of those groups used the right or the concept of equality to support their struggle for recognition. Those claims were often based on “sameness in difference” and led each group to compare itself to other, already recognized groups.

I. Indigenous Peoples and Equality Claims

Explaining this complex outcome requires a deeper understanding of certain aspects of the right to equality and of the manner in which it can be applied to the claims of ethnic groups such as the indigenous peoples. In particular, we must pay attention to the manner in which the concepts of comparison, sameness and difference play out in each case.

The liberal argument for cultural rights based on substantive equality is grounded in the idea that the State must respond positively to cultural differences where the failure to do so would actually put members of a cultural minority at a disadvantage.⁵ Thus, an assertion of difference grounds specific rights aimed at enabling members of the group to live according to their culture and to perpetuate that culture. However, assertions of sameness may also ground claims to cultural rights in a situation where such rights are already recognized to some individuals, but denied to others who share the same culture. For example, indigenous women who, in a number of famous cases, claimed that they were unjustly deprived of Indian status were, in a sense, asserting their sameness to indigenous men who kept their status in similar circumstances.⁶ In other words, they were in the same

⁵ For an application of this idea to the context of language rights, see *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3 at para. 31; *Gosselin v. Quebec (A.G.)*, [2005] 1 S.C.R. 238 at paras. 15, 21. An analogy in a different context would be *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, where the failure to provide sign-language translation to deaf persons was considered to be a breach of equality.

⁶ See, e.g., *A.G. Canada v. Lavell*; *Isaac v. Bédard*, [1974] S.C.R. 1349; *Lovelace v. Canada*, U.N. Doc. CCPR/C/13/D/24/1977 (1981); *Mclvor v. Canada (Registrar of Indian and Northern Affairs)* (2009), 306 D.L.R. (4th) 193 (B.C.C.A.); for an analysis of these cases, see Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal and Kingston: McGill-Queen's University Press,

situation as those whose difference already translated into specific rights. For that reason, we will call this sort of claim a claim of “sameness in difference.” This category of claims assumes that a particular kind of cultural difference has already been validated by the State as a source of specific rights, but that the claimants assert that the definition given by the State to the category of persons who may benefit from those rights is under-inclusive, as it excludes persons, such as the claimants, who share the same cultural difference (hence, “sameness in difference”) as the persons who are included.

The same distinction also applies when claims are made on a collective basis. (By this, we mean that what is sought is a collective right or a right that can only be enjoyed collectively.) A minority group may say that specific rights are necessary for its cultural survival. Professor Magnet, for one, has elaborated a theory of equality between groups that ensures that cultural minorities have the same opportunities to enjoy and perpetuate their cultures as the majority group. As he puts it: “A group is equal to other relevant groups when it possesses adequate means of perpetuation.”⁷ His theory is aimed at maintaining the minority’s difference or specificity and is not inherently based on a comparison with other groups.

But again, a minority group might make a claim based on “sameness in difference,” that is, it could challenge its exclusion from rights or benefits granted to another minority group that shares the same (or a similar) culture. For example, in *Ardoch Algonquin First Nation*,⁸ a number of non-status indigenous groups successfully asserted that they should have the same opportunity as First Nation groups to conclude agreements for the management of workforce training programs aimed at their constituencies. The plaintiffs did not so much argue that the management of a workforce training program was essential to the maintenance of their culture; they rather asserted that, given that the program was aimed at the indigenous population generally, and that the government had seen fit to delegate its management to First Nations, it should extend the same treatment to non-status groups.

Of course, the application of those concepts to practical situations depends on factual judgments about which cultural differences require specific rights for their maintenance, or which similarities call for similar treatment. Culture, ethnicity or identity are not easily measurable nor compared. The difficulty of identifying the differences that call for specific treatment is illustrated by the process by which the courts select the “analogous grounds” that attract the protection of the right to equality. (Section 15 of the

2009) at 91-99; Sébastien Grammond, “Discrimination in the Rules of Indian Status and the *Mclvor* case” (2009) 35 *Queen’s L.J.* 421.

⁷ Joseph Eliot Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (Toronto: LexisNexis Butterworths, 2004) at 237. See also section 16.1 of the *Canadian Charter of Rights and Freedoms*, which refers to the equality of the French and English linguistic communities in New Brunswick.

⁸ *Ardoch Algonquin First Nation v. Canada (A.G.)*, [2004] 2 F.C.R. 108 (C.A.); see also Sébastien Grammond, “Equality Between Indigenous Groups” (2009) 45 *Sup. Ct. L. Rev.* (2d) 91.

Canadian Charter of Rights and Freedoms prohibits discrimination not only on the basis of the grounds enumerated therein, but also on “analogous” grounds identified by the courts.) This process relies heavily on existing social categories, identity groups and patterns of discrimination and prejudice. For example, with respect to sexual orientation, the Supreme Court noted that this was a characteristic profoundly related to individual identity and that could not easily be changed.⁹ One can appreciate, however, that such a conclusion depends on the knowledge and representations of the judges about homosexuality and its link to personal identity. Hence, the practical application of the right to equality may very well depend on dominant social perceptions or representations of the situation or identity of disadvantaged groups. Thus, sameness and difference with respect to cultural groups may be difficult to assess, by the judiciary or otherwise.

An additional difficulty arises when a group seeks specific rights on the basis of the right to equality, as the recognition of its difference. Deciding what bundle of specific rights is necessary for the preservation of a group’s culture involves not only a “measurement” of the group’s cultural specificity, but also practical judgments as to the contribution of certain rights or policies to the preservation of that specificity, as well as a cost-benefit analysis of those rights or policies. This task is all the more difficult in the case of unrecognized indigenous groups, as their cultural difference has generally been denied for a long period by the government, by non-indigenous society and often by other recognized indigenous groups. Those difficulties, however, are not present when their claims are framed in terms of “sameness in difference.” In those cases, the courts are not called upon to craft new measures intended to protect a group’s culture, but rather to decide whether existing measures in favour of group A should be extended to group B which is culturally similar. Such a judgment may more easily be made on an intuitive basis, or on the basis of a superficial analysis of some of the two group’s cultural traits.

As a result, we may hypothesize that indigenous groups seeking recognition will be more successful if they frame their claims as claims to “sameness in difference,” that is, that they try to liken their situation to that of other indigenous groups whose status and rights are already recognized. A side effect of this tendency is to bring back the search for comparator groups at the forefront of equality analysis, even though the Supreme Court has tried to downplay the importance of comparison in such cases, given the obstructive effects it had on many kinds of claims, in particular where no useful comparison may be drawn or where a comparison fails to capture the essence of the disadvantage that flows from a distinction.¹⁰

Studying the struggle of the indigenous peoples of Newfoundland and Labrador bears out this hypothesis. The starting point of that struggle is the “official” classification of the indigenous peoples that derives from legislation and government policy. That classification usually reflects the views and the goals of government officials and non-indigenous society in general. Yet that classification is constantly challenged by the claims

⁹ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 90; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 13.

¹⁰ *Withler v. Canada (A.G.)*, [2011] 1 S.C.R. 396 at paras. 55-63.

of groups that are excluded from it. Those groups seek to liken their circumstances to that of groups that are already recognized – they want to be treated equally with them. Sadly, they also stress their differences with other unrecognized groups, in an attempt to portray themselves as more deserving of recognition than others. Over the last 40 years, the response of the federal government to the claims of unrecognized groups has had the effect of making the “official” classification more complex. In blunt terms, new categories were created for groups who were seen as “less indigenous” according to the stereotypes of the non-indigenous society, attracting a narrower bundle of rights than groups with Indian status. The result is a hierarchy of indigenous peoples or a kind of ladder of statuses. When a group seeks recognition by invoking the right to equality, it is trying to climb this ladder as much as it can, by a delicate deployment of sameness and difference in establishing positive and negative comparisons to other groups and by showing to outsiders features usually associated with recognized indigenous groups. Thus, while equality was a driving force in the developments of the last 30 years, the end result might very well be a patchwork of indigenous groups. Whether that outcome reflects the actual needs and circumstances of the groups concerned or the views and prejudices of dominant society is a difficult question that cannot be fully addressed in the context of this paper.

In the following pages, I will analyze the successive use of formal and substantive conceptions of equality to justify the non-recognition and, later, the recognition of Newfoundland and Labrador’s indigenous peoples. For each group that sought recognition, I will show how its discourse and actions invited comparisons with certain other groups and avoided comparisons with others. The focus will not be so much on court decisions, for most lawsuits were settled, but on the arguments made in various legal fora as well as the reconfiguration of political organizations that reflected the struggles for recognition. Indeed, joining a political organization or breaking away from one are powerful ways of asserting one’s views as to the proper terms of comparison under an equality analysis. In that sense, the needs of the construction of a legal case does have impacts on the manner in which the indigenous peoples build their political organization. At the same time, the legal categories are transformed and made more complex by the struggle for recognition and the negotiated solutions reached with various groups.

II. Assimilation and Equality

During the period preceding Confederation in 1949, the “official” classification of the indigenous peoples was based on the “Indian/white” dichotomy.¹¹ The *Indian Act* categorized, through the use of criteria based on ancestry, a number of persons as being “Indian,” and those who were not “Indians” were defined as being “persons.”¹² The assumption behind the classification was that “Indians” were uncivilized, and the goal, as exemplified through the statutory mechanism of enfranchisement, was to bring an

¹¹ Sébastien Grammond, *Identity Captured by Law: Membership in Canada’s Indigenous Peoples and Linguistic Minorities* (Montreal and Kingston: McGill-Queen’s University Press, 2009).

¹² *Indian Act*, S.C. 1876, c. 18, s. 3(12), definition of “person.”

increasing number of Indians to lose that characterization or, to use racial terms, to become “white.” The label of “Indian” was clearly seen as a badge of inferiority.

With a few exceptions, the scheme of the *Indian Act* did not allow for intermediate categories. The Act did not grant rights to non-status Indian groups. Thus, the Métis who accepted scrip would not be considered as status Indians, but as white persons who did not need the protection of the Act. The main recognized anomaly in this binary distinction was the Inuit, who were recognized as “Indians” under section 91(24) of the *Constitution Act, 1867*,¹³ even though the federal government refused to bring them within the purview of the *Indian Act*.

Hence, Newfoundland joined Canada in a context that did not favour the creation of specific categories of indigenous peoples and where the existence of a specific legal regime for the indigenous peoples was viewed as temporary.

A. INDIGENOUS NEWFOUNDLAND AND LABRADOR AND COLONIZATION

It is generally accepted that prior to European colonization, Newfoundland was inhabited by an indigenous people called the Beothuk. Labrador, on its part, was inhabited by the Inuit, mainly on the coast, and by the Innu, who occupied mostly the interior.

What remains a matter of debate is the circumstances of the arrival of the Mi’kmaq in Newfoundland. The Mi’kmaq assert that they were able to cross Cabot Strait from today’s Nova Scotia and to establish themselves in southern Newfoundland before the establishment of a firm European presence.¹⁴ Others contend that the Mi’kmaq were brought to the Island by the French, who maintained fishing posts on the Island until the 18th century and who needed allies to fight the Beothuk.¹⁵

Colonization of Newfoundland and Labrador was relatively slow. Fishing remained for a long time the most important economic activity. Fishing did not require the extensive use of land, so the population of European origin remained concentrated on the coasts. Yet, as the British presence developed, violent conflict with the Beothuk increased. Historians generally consider that as a result of these conflicts and other factors, including the spread of disease, the Beothuk became extinct in the early 19th century. The characterization of those events remains highly controversial: some go as far as to speak of extermination¹⁶ or

¹³ *Re Eskimos*, [1939] S.C.R. 104; regarding that case, see Constance Backhouse, *Color-Coded: A Legal History of Racism in Canada 1900-1950* (Toronto: University of Toronto Press, 1999) at 39-52.

¹⁴ Maura Hanrahan, *The Lasting Breach: The Omission of Aboriginal People from the Terms of Union Between Newfoundland and Canada and its Ongoing Impacts*, paper prepared for the Royal Commission on Renewing and Strengthening our Place in Canada, 2003, on line:

<http://www.gov.nl.ca/publicat/royalcomm/research/Hanrahan.pdf> (accessed 5 January 2014) at 220; see also Bonita Lawrence, “Reclaiming Ktaqamkuk: Land and Mi’kmaq Identity in Newfoundland” in Julian Agyeman, ed., *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2009) 42 at 47.

¹⁵ See, e.g., Sean T. Cadigan, *Newfoundland and Labrador: A History* (Toronto: University of Toronto Press, 2009) at 53, who mentions that it is possible that the Mi’kmaq visited Newfoundland as early as the 16th century, but emphasizes the fact that the French incited more Mi’kmaq to settle on the southern coast of the Island.

¹⁶ L. Upton, “The Extermination of the Beothuks of Newfoundland” (1977) 58 *Canadian Historical Review* 133.

“an open hunting season against the Beothuk,”¹⁷ whereas other historians simply note in passing the conflict between colonists and the Beothuk and its tragic end.¹⁸ It may well be that some Beothuk actually joined other indigenous groups, although this is difficult to trace precisely.

Newfoundland did not have a well-defined policy towards its indigenous peoples.¹⁹ It did not have a comprehensive statutory scheme similar to the Canadian *Indian Act*. It did not operate a system of reserves, although the establishment of a reserve for the Mi’kmaq of Conne River was contemplated towards the end of the 19th century.²⁰ Most importantly, it did not have rules concerning Indian status, that would legally ascribe an indigenous identity to a part of its population.

The ethnic identity of the indigenous peoples of Newfoundland and Labrador was not static and the ways in which some of those groups conceived of their identity, or represented it to outsiders, shifted over time. These changes were the result of phenomena such as mixed unions, assimilative pressures and stigmatization of the indigenous peoples on the part of Euro-Canadians.

On the Island, Mi’kmaq identity became less visible as a result of such factors. It appears that the Mi’kmaq intermarried in large numbers with non-indigenous Newfoundlanders. Mi’kmaq identity was not always transmitted to the children of such unions, as indigenous ancestry was often a source of shame (the term “jackatar” was pejoratively used to describe persons with indigenous ancestry). Bartels and Bartels give examples of persons who have Mi’kmaq ancestry but were not told about it in their childhood and who only recently decided to emphasize that aspect of their identity.²¹ As descendants of these unions integrated into mainstream society, distinctive cultural practices were not always retained and homogeneous and isolated indigenous communities were no longer the norm. Yet, some communities remained ostensibly

¹⁷ Olive P. Dickason with David T. McNab, *Canada’s First Nations: A History of Founding Peoples from Earliest Times*, 4th ed. (Toronto: Oxford University Press, 2009) at 71.

¹⁸ Sean T. Cadigan, *Newfoundland and Labrador: A History* (Toronto: University of Toronto Press, 2009) at 53-54, 86-87, 93-95

¹⁹ Adrian Tanner, “The Aboriginal Peoples of Newfoundland and Labrador and Confederation” (1998) 14 *Newfoundland Studies* 238 at 241-244; David Mackenzie, “The Indian Act and the Aboriginal Peoples of Newfoundland at the Time of Confederation” (2010) 25 *Newfoundland and Labrador Studies* 161 at 163.

²⁰ Maura Hanrahan, *The Lasting Breach: The Omission of Aboriginal People from the Terms of Union Between Newfoundland and Canada and its Ongoing Impacts*, paper prepared for the Royal Commission on Renewing and Strengthening our Place in Canada, 2003, on line: <http://www.gov.nl.ca/publicat/royalcomm/research/Hanrahan.pdf> (accessed 5 March 2014) at 235.

²¹ Dennis Bartels and Alice Bartels, “Mi’kmaq Lives: Aboriginal Identity in Newfoundland” in Ute Lischke and David T. McNab (eds.), *Walking a Tightrope: Aboriginal People and Their Representations* (Waterloo: Wilfrid Laurier University Press, 2005) 249. Regarding the current revival of Mi’kmaq culture, see Angela Robinson, ““Being and Becoming Indian”: Mi’kmaq Cultural Revival in the Western Newfoundland Region” (2012) 32:1 *Canadian Journal of Native Studies* 1.

Mi'kmaq. Conne River was one of those, but some observers note that other communities such as Flat Bay, Badger, St. Georges or Glenwood had an important Mi'kmaq population and were always considered Mi'kmaq communities.²²

In northern Labrador, beginning in the late 18th or early 19th century, marital unions between indigenous – mainly Inuit – women and men who settled on the coast to take part in fishing and in the trade gave rise to a population of mixed ancestry who became distinct from the Inuit, yet developed a culture that drew upon both indigenous and European traits.²³ These people were called the “Settlers” or, in Inuktitut, *Kablunangajuit*.²⁴ The Settlers were initially mocked by the Inuit. The Moravian missionaries who established stations on the Labrador coast tried to maintain the Settlers and the Inuit separate, which contributed to the rise of a specific ethnic consciousness on the part of the Settlers.

A similar phenomenon took place in southern Labrador as well.²⁵ However, the less structured administration of that part of the territory resulted in a higher degree of assimilation to European culture, including a much less frequent use of the Inuktitut language. Moreover, stigmatization of indigenous identity led many people to hide their ancestry, although indigenous persons knew that they were different from their non-indigenous neighbours.²⁶ According to scholar John C. Kennedy, “Group consciousness was tacit, loosely bounded, not reinforced by social or administrative institutions, and not mobilized around the obvious criteria usually epitomizing a group or nation, such as for example, language, or even group name.”²⁷

B. CONFEDERATION (1949) AND ITS AFTERMATH

As is well known, Newfoundland joined Canada in 1949, becoming its tenth province. One of the topics that were discussed by the Canadian and Newfoundland governments during the negotiations concerning the terms of union were the indigenous peoples. While both governments initially thought that the *Indian Act* would apply in the new province,²⁸ entailing the creation of reserves and bands and the registration of Indians, they later changed their minds and decided, provisionally at least, to treat indigenous Newfoundlanders no differently than other citizens.

This decision must be set against the background of the Canadian policies of the time. In 1949, a process of revision of the *Indian Act* was underway. The distinctive legal

²² Adrian Tanner, *supra* note 19, at 243-244; Bonita Lawrence, *supra* note 14 at 57; Jerry Wetzel, “Liberal Theory as a Tool of Colonialism and the Forced Assimilation of the First Nations of Newfoundland and Labrador” (1995) 4 Dal. J. of Legal Stud. 105 at 142-143.

²³ John C. Kennedy, “Labrador Metis Ethnogenesis” (1997) 62:3-4 Ethnos 5.

²⁴ With respect to the various names employed to describe this population, see Yves Labrèche and John C. Kennedy, “Héritage culturel des Métis du Labrador central” (2007) 37:2-3 Recherches amérindiennes au Québec 43.

²⁵ *Ibid.*; John C. Kennedy, *supra* note 23 at 11-13; Paul Charest, “La spécificité culturelle des communautés métisses du Labrador méridional” in Denis Gagnon and Hélène Giguère (eds.), *L'identité métisse en question: stratégies identitaires et dynamismes culturels* (Quebec City: Presses de l'Université Laval, 2012) 99.

²⁶ Paul Charest, *supra* note 25.

²⁷ John C. Kennedy, *supra* note 23 at 13.

²⁸ David Mackenzie, *supra* note 19, at 166; Adrian Tanner, *supra* note 19, at 244-245.

treatment of the indigenous peoples was seen as a temporary measure that would prepare them for their assimilation in mainstream Canadian society, i.e., their becoming “full citizens.” The new Act, adopted in 1951, promoted enfranchisement, i.e., the loss of Indian status of those who had attained a certain “degree of civilization.” It would also, through section 88, pave the way for the application of provincial legislation and services to the indigenous peoples. The reluctance to extend the reach of the *Indian Act* was also evident in the Canadian government’s refusal to apply it to the Inuit, despite a Supreme Court decision holding that they fell under federal jurisdiction.²⁹ Moreover, in the years following World War II there was a greater awareness of human rights, and the separate legal treatment of the indigenous peoples, which resulted, among other things, in their inability to vote, was seen by many as a form of racial discrimination.

In that context, Canadian officials gradually realized that extending the *Indian Act* to the indigenous peoples of Newfoundland would deprive the latter of certain rights, most importantly the right to vote.³⁰ This argument eventually convinced most participants in the negotiations that it would be better to leave the administration of indigenous affairs to the new province. Other arguments were also mentioned, such as the difficulty of creating reserves in the new province. In truth, however, the issue was not at the forefront of the union discussions and the decision not to apply the *Indian Act* in Newfoundland appears to have been more the result of inertia and lack of interest than that of any principled analysis.

Moreover, Canadian officials doubted the authenticity of the indigenous identity of the Mi’kmaq of Newfoundland. For example, an official sent on a fact-finding mission in 1948 reported that Newfoundland’s indigenous population was wholly located in Labrador.³¹ Later documents of the Department of Indian Affairs show that it was believed that the Mi’kmaq had become “merged with other citizens.”³²

After Confederation, the federal government took some years to even acknowledge that it bore some responsibility for the indigenous peoples of Newfoundland. After initial public denials of responsibility and internal debates as to its jurisdiction, it concluded funding agreements with the province to cover the costs of providing services to the indigenous population, first in 1954, and then with respect to a broader range of services in 1965.³³ One original feature of these agreements is that they did not focus on services provided to individuals holding Indian status, but provided benefits to all residents of

²⁹ Sébastien Grammond, *Identity Captured by Law: Membership in Canada’s Indigenous Peoples and Linguistic Minorities* (Montreal and Kingston: McGill-Queen’s University Press, 2009) at 82-84.

³⁰ David Mackenzie, *supra* note 19; Adrian Tanner, *supra* note 19, at 245-246; see also Jerry Wetzel, *supra* note 22 at 132-133.

³¹ Quoted in David Mackenzie, *supra* note 19, at 170.

³² Memorandum by H.L. Keenlyside, 25 October 1949, quoted in Jerry Wetzel, *supra* note 22 at 133; see also Adrian Tanner, *supra* note 19, at 243.

³³ See, e.g., *Anderson v. Canada (A.G.)*, [2012] 2 C.N.L.R. 1 (N.L.C.A.).

certain “designated communities,” which were generally regarded as being mostly indigenous.³⁴ Initially, the designated communities were all in northern Labrador, but Conne River was added in 1973, at the behest of the Native Association of Newfoundland and Labrador (the “NANL”).³⁵ Even though these agreements were based on the indigenous character of the designated communities and the federal government’s jurisdiction over the indigenous peoples, they used geographical criteria which avoided the identification of specific individuals as being indigenous or not.

Yet, other forms of inequality kept on haunting federal officials. In memos written in the 1960’s, Department of Justice officials underscored the fact that the indigenous peoples of the province were deprived of the benefits offered to their counterparts elsewhere in Canada. The argument to the effect that the indigenous peoples of Newfoundland had the “benefit” of enfranchisement was countered with the argument that they were never given the choice to enfranchise or to retain Indian status, contrary to the practice in other parts of the country.³⁶ Thus, the attempt to invoke formal equality to justify the non-recognition of indigenous identity in Newfoundland became less convincing when it was realized that various comparisons could be drawn and some of them would support the granting of status to the province’s indigenous population. Formal equality led to the suppression of difference, whereas the people concerned wanted to retain and assert their difference and had never been consulted on the subject.

III. Recognition and Equality

As a result of the resurgence of indigenous activism in the late 1960’s and early 1970’s, the formal equality paradigm that underpinned the refusal to grant a specific legal status to the indigenous peoples of Newfoundland and Labrador became increasingly untenable. It became obvious that the indigenous peoples of that province had not become assimilated. Equality came to be invoked in support of claims for recognition.

The strategies that they deployed to gain recognition made explicit use of the legal concept of equality. Beyond that, they also sought to position themselves as being the equals of other indigenous groups. In so doing, they were inviting comparisons between various indigenous groups, thus asserting their “sameness in difference.” But some groups of the province also sought to distance themselves from other groups that were perceived as “less indigenous,” in order to increase their chances of obtaining recognition. In so doing, they were trying to position themselves within the classification or hierarchy of

³⁴ Bill Rompkey, *The Story of Labrador* (Montreal and Kingston: McGill-Queen’s University Press, 2003) at 101ff; Evie Plaise, “The Lie of the Land: Identity Politics and the Canadian Land Claims Process in Labrador”, in Derick Fay and Deborah James (eds.), *The Rights and Wrongs of Land Restitution* (New York: Routledge Cavendish, 2009) 67 at 71.

³⁵ Adrian Tanner, *supra* note 19, at 247; John C. Kennedy, “Aboriginal Organizations and Their Claims: The Case of Newfoundland and Labrador” (1987) 19:2 *Canadian Ethnic Studies* 13 at 15.

³⁶ Cabinet Memorandum, 22 April 1965, quoted in Jerry Wetzel, *supra* note 22 at 141.

indigenous groups that results from federal policies³⁷ and they were indicating to whom they wanted to be compared.

During the relevant period, that classification became more complex than the “Indian/non-Indian” binary distinction that underpins the *Indian Act*. Of course, First Nations composed of status Indians residing on reserves remain at the top of the classification. Yet, as more and more status Indians have moved outside the reserves to live in an urban or rural setting, federal policies and legislation operate in a way that affords much less funding and rights to off-reserve Indians, thus creating a divide within the category of “Indian” itself. Nationally, on-reserve status Indians are represented by the Assembly of First Nations (“AFN”). The next category is that of “Inuit.” While the Inuit have never been brought under the *Indian Act* for historical reasons, most federal policies treat them on par with status Indians and grant them similar benefits, with some notable exceptions such as the tax exemption. This similarity of treatment, combined with the geographical isolation of most Inuit, produces a popular representation of that category that carries the same level of indigeneity and authenticity as for status Indians. Nationally, the Inuit are represented by the Inuit Tapirisat of Canada (“ITC”), now called Inuit Tapiriit Kanatami (“ITK”).

In an attempt to manage the increasing attractiveness of indigeneity and the growing number of groups who sought recognition, the federal government constructed a “non-status” indigenous population and dealt with it through channels that are separate from the Indian Affairs bureaucracy. While it is by no means homogeneous, this third category comprises persons who are neither status Indians nor Inuit and who may chose to identify to such labels as Métis, non-status Indians or Aboriginals. The federal government’s refusal to consider that this category of persons falls under its jurisdiction places them at a serious disadvantage compared to status Indians and Inuit; most programs offered to the latter are unavailable to these groups.³⁸ Yet, the federal government has provided funding to associations that represent this category of persons, and certain programs are made available to all indigenous persons irrespective of Indian status.³⁹ The selection of the groups to whom such funding is offered has had a significant influence on the structuring of indigenous identity.⁴⁰ Thus, the government recognizes one national association (the Métis National Council or “MNC”) and one association in each of the

³⁷ For a detailed discussion of the emergence of that classification, see Sébastien Grammond, “Equality Between Indigenous Groups” (2009) 45 Supreme Court Law Review (2d) 91.

³⁸ This refusal was challenged with success in *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6, which held that Métis and non-status Indians fall under federal jurisdiction. The case will be heard by the Federal Court of Appeal in the fall of 2013.

³⁹ See, e.g., the human resource training program at stake in *Ardoch Algonquin First Nation v. Canada (A.G.)*, [2004] 2 F.C.R. 108 (C.A.).

⁴⁰ Larry Chartrand, “Métis Identity and Citizenship” (2001) 12 Windsor Review of Legal and Social Issues 5; Joe Sawchuk, “Negotiating an Identity: Métis Political Organizations, the Canadian Government and Competing Concepts of Aboriginality” (2000) 24 American Indian Quarterly 73.

Western provinces and Ontario representing the Métis Nations of the Canadian West. In addition, the government funds one national association (the Congress of Aboriginal Peoples or “CAP”) and its provincial affiliates to represent aboriginal peoples who are neither status Indians, Inuit nor members of the Métis Nation. Yet, CAP’s affiliates may have membership policies that exclude a number of persons who assert an indigenous identity,⁴¹ thus creating a fourth category of indigenous peoples who are deprived of any official recognition or rights and whose political organization is limited to self-funded voluntary associations.

Over the last 40 years, the indigenous groups of Newfoundland and Labrador have tried to gain recognition not only from governments, but also from the associations representing the various categories of indigenous peoples elsewhere in the country. Recent research has highlighted the part played by inter-indigenous recognition in the definition of various forms of indigenous status.⁴² In the case at hand, such recognition allowed certain groups to buttress their equality claims by inviting a comparison with groups that were in the upper rungs of the hierarchy of indigenous peoples described above. In other words, trying to join a national association is a form of assertion of identity; it shows who you think your equals are. However, it must be underscored that this form of jockeying has the effect of reinforcing the official categories instead of challenging them.

In the next pages, we will describe the legal and political strategies of the indigenous groups of the province. For each case, we will analyze how the concept of equality played an implicit or explicit role in support of their claims, as well as the ways in which they indicated to which groups they wanted to be compared and the results they obtained. We will also highlight how the search for comparators has driven the splits and mergers among indigenous political groups, and how the groups emphasized certain forms of difference in support of their quest for recognition. In the end, we will be in a position to appreciate how the groups’ actions subverted the federal government’s will to keep as many people as possible in the lower rung of the classification.

A. THE LABRADOR INUIT ASSOCIATION

As we mentioned earlier, northern Labrador was populated by Inuit and “Settler” groups. While the two groups remained quite distinct, the “designated communities” system resulted in both being eligible for the benefits resulting from federal-provincial agreements. In the early 1970’s, when indigenous groups across the country intensified their political organization, the Inuit of northern Labrador were approached by the Inuit Tapirisat of Canada, the national Inuit organization, to form a regional chapter.⁴³ This is how the Labrador Inuit Association (“LIA”) was created in 1972-73. Yet, the issue of membership in the LIA sparked a controversy: could the Settlers join this organization?

⁴¹ See, e.g., Pamela D. Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing, 2011) at 198-199; Sébastien Grammond, Isabelle Lantagne and Natacha Gagné, “Aux marges de la classification officielle: les groupes autochtones sans statut devant les tribunaux canadiens” (2012) 81 *Droit et société* 321.

⁴² Kirsty Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford: Oxford University Press, 2010).

⁴³ John C. Kennedy, “Aboriginal Organizations and Their Claims: The Case of Newfoundland and Labrador” (1987) 19:2 *Canadian Ethnic Studies* 13 at 15-16; John C. Kennedy, *supra* note 23, at 10-11.

Initially, it appears that the ITC was reluctant towards the possibility of extending LIA membership to the Settlers. However, the LIA eventually decided to admit the Settlers, likely because of the possibility of increasing its membership.⁴⁴ (It may also be that because Settlers were admissible to federally-subsidized programs and services offered to northern Labrador communities, their claim to join in whatever benefits that the LIA could secure appeared as the continuation of the former policy of inclusion.⁴⁵) Thus the northern Labrador Settlers were successful in associating with the Inuit and in sharing in the capital of recognition that comes with this label, although they might have been labelled as “Métis” in other circumstances.

The LIA eventually filed a land claim, which was quickly accepted for negotiation, perhaps because the indigenous identity of the Inuit and the validity of their claims are rarely doubted. Despite delays in the negotiation process, the Labrador Inuit Agreement was concluded in 2005 and provided for the creation of a regional government, the Nunatsiavut Government, that is controlled by the Inuit and Settlers.⁴⁶ The definition of the beneficiaries of the Agreement was tailored to take into account the two groups comprising the LIA, although there is a single registry, which means that the two groups are now legally merged.

Geographical isolation may also have played a role in the acceptance of the Inuit-Settler alliance by the governments. By restricting the area of its land claim to northern Labrador, the LIA excluded persons of Inuit ancestry living in central and southern Labrador, whose indigenous identity had received less outside recognition and whose claims might be more threatening to military and resource development interests.

Thus, the signature of the Agreement consecrated the equal treatment of the Inuit and Settlers of Labrador, affirming in a sense that there is no natural boundary between the two groups, at least with respect to the northern part of Labrador. The Settlers were successful in their assertion of sameness to the Inuit, although in the process their difference from the Inuit is legally erased. One should be aware, however, that had the Settlers chosen to insist on their difference and to identify as Métis, their aspirations would have been met with the federal government’s refusal to enter into land claims agreements with Métis groups in the provinces.

B. THE ISLAND: MIAWPUKEK

The early 1970’s also saw the development of indigenous political organizations on the Island of Newfoundland, first through the Native Association of Newfoundland and Labrador (“NANL”), which, as its name indicated, initially attempted to cover the whole province. NANL was founded in 1973, apparently with the support of the Native Council of

⁴⁴ Evie Plaice, *supra* note 34, at 72-73.

⁴⁵ John C. Kennedy, *supra* note 23, at 9-10.

⁴⁶ *Labrador Inuit Land Claims Agreement* (Ottawa: Department of Indian Affairs and Northern Development, 2005).

Canada (“NCC,” the predecessor of CAP), the association that represented non-status and Métis people across Canada.⁴⁷ Yet, as we saw above, the federal government currently does not recognize the NCC/CAP membership as falling under its jurisdiction over “Indians,” even though it has accepted to fund certain programs for their benefit. Moreover, as we saw above, the cultural authenticity of Mi’kmaq people on the Island was often doubted by outsiders. Thus, the NANL suffered from the outset of a negative perception, probably reinforced by the decision of the Innu of Labrador to dissociate from it and to pursue their claims separately.

In order to combat this perception, the NANL changed its name to Federation of Newfoundland Indians (“FNI”) and moved its headquarters to Conne River, a community whose indigenous character appeared more obvious to outsiders, in part because it was inhabited mainly by Mi’kmaq, thus giving it a greater degree of homogeneity than other Mi’kmaq communities on the Island, and because Newfoundland had considered setting a reserve apart for them in the 19th century. It also sought to join the National Indian Brotherhood (the predecessor to AFN). By these gestures, the FNI clearly showed to whom it wanted to be compared and what bundle of rights it sought.

Nevertheless, the federal government remained skeptical of the indigenous identity of FNI members and announced that it would require genealogical evidence to prove it. Conne River was selected as a “pilot project.” In 1982, realizing that it alone could satisfy the requirements of the federal government, Conne River announced that it would withdraw from the FNI, and expressly cast doubt over the legitimacy of the identity of other members of the FNI.⁴⁸ Conne River was constituted as an Indian band in 1984 and changed its name to Miawpukek in 1989,⁴⁹ and a reserve was formally created for them. As a result, Miawpukek members are, individually, exempt from tax for their income earned on the reserve and, collectively, benefit from federal funding associated with the existence of a reserve.

Thus, it is only after a considerable narrowing of the category of persons who were seeking recognition that the federal government was willing to treat them equally to other First Nations in Canada, in effect allowing Miawpukek to join the uppermost category of indigenous peoples in the official classification. In the process, other members of the original class were pushed down the ladder and their status was likened to those whose identity is doubtful or contested and who receive fewer rights as a result. And perhaps the Miawpukek benefited from the presumption, which underpins the federal funding policy, that there must be some Indian group in each province, in the sense that there was no group in the region with a better claim to indigeneity.⁵⁰ It may also be that the glaring omission to recognize the indigenous peoples of the province in 1949 created the impression that there was a gap to be filled.

⁴⁷ John C. Kennedy, *supra* note 43, at 15.

⁴⁸ John C. Kennedy, *supra* note 43, at 17.

⁴⁹ *Order Declaring a Body of Indians at Conne River, Newfoundland, to be a Band of Indians for Purposes of the Act*, SOR/84-501 (1984) 118 Canada Gazette I 2935; *Miawpukek Band Order*, SOR/89-533 (1989) 123 Canada Gazette 4692.

⁵⁰ Evie Plaice, *supra* note 34, at 73.

Yet, Miawpukek members are not treated equally to other First Nations in Canada in one significant respect. Most First Nations elsewhere in the country have either aboriginal or treaty rights or, in some cases, both. However, the provincial government has challenged Miawpukek's claim of aboriginal rights on the basis that the Mi'kmaq were brought to the Island by the French – to put it more bluntly, they were “immigrants.”⁵¹ Therefore, they could not establish that they exercised rights there before the first contacts with the Europeans, as required by the Supreme Court in *Van der Peet*.⁵² Thus, the province's court of appeal denied their claim in a 2006 case.⁵³ This means not only that Miawpukek members do not have aboriginal rights to hunt, trap and fish in their traditional territory, but that they will be unable to assert a right to be consulted when large-scale development projects are under consideration.⁵⁴

C. THE INNU NATION

While the Innu were initially members of the NANL, they separated from it in 1975 in order to form the Naskapi-Montagnais Innu Association, later called the Innu Nation, apparently on the basis that they felt that the NANL was dominated by Mi'kmaq and that they were skeptical of the authenticity of Mi'kmaq indigenous identity.⁵⁵ The Innu were perceived by outsiders as “real Indians”, a case of “obvious indigenous identity,” and they took political positions that were typically associated with the indigenous peoples, such as opposing low-level military flights over their territory as well as resource extraction.⁵⁶ They joined the Quebec provincial chapter of the Assembly of First Nations. Despite their lack of status as an Indian band, they filed a land claim, which was accepted for purposes of negotiation by the federal government in 1978.⁵⁷ Like the Inuit, they also signed an impacts and benefits agreement (“IBA”) concerning the Voisey's Bay mining project that affected their traditional lands. Thus, their lack of status did not prevent them from being recognized by

⁵¹ The Premier of Newfoundland once referred to the Mi'kmaq as immigrants: Dennis Bartels and Alice Bartels, “Mi'gmaq Lives: Aboriginal Identity in Newfoundland” in Ute Lischke and David T. McNab (eds.), *Walking a Tightrope: Aboriginal People and Their Representations* (Waterloo: Wilfrid Laurier University Press, 2005) 249 at 252, 256.

⁵² *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

⁵³ *Drew v. Newfoundland and Labrador (Minister of Government Services and Lands)*, [2007] 1 C.N.L.R. 34 (N.L.C.A.).

⁵⁴ Of course, one might say that this result obtains because the *Van der Peet* test applies to all indigenous peoples in Canada, but that the Miawpukek have been unable to meet the test. However, if one adopts a substantive equality perspective, this overlooks the fact that the *Van der Peet* test is designed so as to produce different outcomes without an adequate justification.

⁵⁵ John C. Kennedy, *supra* note 43, at 17.

⁵⁶ Evie Plaise, *supra* note 34, at 78-79; P. Whitney Lackenbauer, *Battle Grounds: The Canadian Military and Aboriginal Lands* (Vancouver: UBC Press, 2007) at 221-227, 246-247; their opposition gave rise to cases such as *R. v. Ashini*, [1989] 2 C.N.L.R. 119 (Nfld. Prov. Ct.); *Naskapi-Montagnais Innu Association v. Canada (Minister of National Defence)*, [1990] 3 F.C. 381 (T.D.).

⁵⁷ At the time of writing, an agreement-in-principle has been reached, but the final agreement remains to be negotiated: <http://www.aadnc-aandc.gc.ca/eng/1331657507074/1331657630719> (accessed 5 January 2014).

outsiders as indigenous. Their close association and family ties with recognized Innu bands in Quebec no doubt contributed to this recognition.

In parallel, the Innu nation sought a form of political recognition that would provide them with benefits similar to those afforded to First Nations elsewhere in Canada, although outside the *Indian Act*. The failure of those discussions resulted in the filing of a complaint with the Canadian Human Rights Commission. The choice of that forum is telling, as the Commission is rarely asked to inquire into the political claims of the indigenous peoples, in large part because matters arising under the *Indian Act* were, until recently, excluded from its jurisdiction.⁵⁸ As the Commission's mandate is to implement the right to equality, the Innu complaint was framed specifically in those terms:

[...] the policies of the Canadian and Newfoundland governments regarding the delivery of most services to the Innu does not recognize them as an aboriginal people. We are of the view that this constitutes discrimination, and an infringement of the human rights and aboriginal rights of the Innu.⁵⁹

The Innu complaint also outlined how this lack of recognition resulted in differential benefits for the Innu, including the impossibility to assume local control of educational and social services and to enter into negotiations towards self-government. To handle the complaint, the Commission appointed a special investigator, Dean Don McRae of the University of Ottawa, who produced a report that largely substantiated the Innu complaint. Thus, the federal government's failure "to acknowledge and assume its constitutional responsibility for the Innu as aboriginal people" resulted in the loss of "the opportunity at that time to become registered under the Indian Act and to have reserves created." Moreover, the consequence of this denial was that "the Innu have not received the same level and quality of services as are made available to other aboriginal peoples in Canada."⁶⁰ It is worthy of note that in this process, the investigator did not see it necessary to belabour the point that the Innu were indigenous nor to justify his choice of First Nations under federal jurisdiction elsewhere in the country as the proper comparator, as if these points were obvious.

The complaint and the report eventually induced the federal government to offer recognition to the Innu as *Indian Act* bands, which materialized in 2002.⁶¹ Reserves were created at Sheshatshiu and Natuashish. As a result, the Innu are now eligible for a tax exemption for income earned on the reserves as well as for the other benefits granted by the federal government to individual Indians (e.g., post-secondary tuition fees or non-insured health benefits) and, collectively, to benefits provided to Indian bands with a

⁵⁸ *Canadian Human Rights Act*, R.S.C. 1985, c. H-5, s. 67, now repealed.

⁵⁹ Letter from Peter Penashue, President of the Innu Nation, to Max Yalden of the Canadian Human Rights Commission, 16 July 1992, reprinted in Donald M. McRae, *Report on the Complaints of the Innu of Labrador* (Ottawa: Canadian Human Rights Commission, 1993).

⁶⁰ All quotes from Donald M. McRae, *supra* note 59 at 73.

⁶¹ *Mushuau Innu First Nation Band Order*, SOR/2002-415; *Sheshatshiu Innu First Nation Band Order*, SOR/2002-414.

reserve. Collectively, the Innu bands can now benefit from the whole array of financial agreements extended to other First Nations.

D. THE ISLAND: QALIPU

In the early 1980s, the singling out of the Conne River community as the only Newfoundland Mi'kmaq community to be transformed into an Indian band (the Miawpukek) amounted to a clear differentiation between "authentic" Indians and other indigenous peoples who were not deserving of federal recognition. The implied message was that the communities represented by the Federation of Newfoundland Indians were less authentic than the Miawpukek. Of course, this was rarely officially stated in so many words. Perhaps one candid statement was made by a federal official in 1949, to the effect that the Mi'kmaq had become "merged with other citizens."⁶² The idea that further genealogical research was needed, given as an explanation of why only Conne River was recognized in the early 1980s, may be a more polite way of describing the widespread disbelief towards the authenticity of the FNI members as an indigenous group.

The federal government's view until the early 2000s seems to have been that the FNI membership should be considered as "non-status Indians," thus remaining on the lower rung of the classification. And this was reflected in the fact that the FNI joined CAP, the national association that represents non-status and off-reserve indigenous peoples. Yet the FNI was eventually successful in asserting its right to Indian status, through a combination of legal action, representation of an "Indian" identity and negotiation with the federal government.

When, in the late 1980's, the federal government announced that it would not pursue the option of registering FNI members as Indians, the FNI responded with a lawsuit in the Federal Court, in which it claimed the following:

- 1) Declaring that the FNI Members are "Indians" within the meaning of s. 91(24) of The Constitution Act, 1867;
- 2) Declaring that the failure of Canada to provide the Plaintiffs with the benefits, entitlements and rights provided to other recognized Indians and Indian bands, including members of the Conne River (Miawpukek) Band, is discriminatory, and contrary to Section 15(1) of the Charter;
- 3) Declaring that the FNI Members are entitled to receive benefits from Canada comparable to those provided by Canada to the Conne River (Miawpukek) Band members under the Canada/Newfoundland/Native Peoples Conne River Agreement of 4 July 1981, and any successor agreement;

⁶²

Supra, note 32.

4) Directing the Governor-in-Council to recognize the member Bands of the Federation as bands under The Indian Act; and

5) Awarding damages to the Federation for the breach by Canada of its fiduciary obligation to the member Bands of the Federation, which breach was Canada's failure to extend the benefits of The Indian Act and the CNA to them.⁶³

As can be seen from this summary, the FNI lawsuit was based on the concept of a fiduciary obligation, but most importantly on the right to equality. Thus, the statement of claim⁶⁴ indicates clearly to whom the FNI members want to be compared. It asserts that the FNI membership is part of a single "Mi'kmaq Indian Nation" present throughout Atlantic Canada and in Eastern Quebec (para. 4). FNI members are said to be recognized by the Grand Council of the Mi'kmaq Nation (para. 5), which shows the importance of recognition by other indigenous groups in the assertion of indigenous identity. It is also stated that there are "no significant racial, cultural or ethnographic differences" between the FNI membership and Mi'kmaq in other provinces who are recognized as status Indians (para. 18). More specifically, the statement of claim asserts that there is no defensible distinction between the Miawpukek (Conne River) Band and the FNI member bands:

that the Mi'kmaq who live in or contiguous to the community of Conne River and the Mi'kmaq who live elsewhere on the Island of Newfoundland are descended from common ancestors, and that there are no significant racial, cultural or ethnographic differences between and among them, except insofar as any two individuals may have a different number of Indians among their ancestors. A Mi'Kmaq who lives in Conne River ultimately shares the same Indian ancestry, either as to nature or degree, as a Mi'Kmaq Indian who lives elsewhere on the Island (para. 17).

It then goes on to highlight the fact that the FNI member bands have not been provided with any of the benefits afforded to Miawpukek following its recognition as an Indian band (paras. 27 and 31-33). As an additional argument, the FNI membership is also compared to the Innu and Inuit of Labrador, who have been provided benefits through the Canada-Newfoundland agreements (para. 34).

The FNI also filed a complaint with the Canadian Human Rights Commission. Like in the Innu case, the Commission mandated an external investigator, Professor Noel Lyon. Professor Lyon's report drew upon the findings of Dean McRae's report concerning the Innu and stated that they "applie[d] equally to the Mikmaq peoples of Newfoundland."⁶⁵ Yet, contrary to the McRae report, the Lyon report acknowledged that the indigenous identity of the FNI members was being questioned and that the issue needed to be

⁶³ *Federation of Newfoundland Indians v. Canada*, 2011 FC 683 at para. 3 [this is actually a judgment on a related procedural motion].

⁶⁴ Second Amended Statement of Claim in Federal Court file no. T-129-89 [on file with author].

⁶⁵ Noel Lyon, *The Mikmaqs of Newfoundland*, report prepared for the Canadian Human Rights Commission, October 1997, at 2.

addressed. Thus, in the introduction to his report, Professor Lyon noted that it was unclear whether the FNI members would have been entitled to registration had the *Indian Act* criteria been applied to them in 1949. He went on to lament the effects of colonization on the assertion of Mi'kmaq identity:

With the passage of time the processes of intermarriage and assimilation with the incoming European peoples makes it increasingly difficult to establish Mikmaq identity. If the process of registration had been undertaken in 1949 the greater isolation of Mikmaq communities would have made the task easier. Only the tenacious commitment of these ten communities to the cultural heritage of their children has kept the lines that separate European and Mikmaq cultures from being blurred beyond recognition.⁶⁶

Professor Lyon then devoted an entire section of his report to a detailed discussion of each Mi'kmaq community. While he acknowledged that many Mi'kmaq had assimilated into mainstream society as a result of economic pressures or government policy, he noted that "What both governments apparently did not know is that there were pockets of Mikmaq people in Newfoundland who had chosen to continue living according to their own cultural values and practices and these groups formed living communities and remain so to this day."⁶⁷ Professor Lyon then went on to describe each Mi'kmaq band, paying particular attention to the socio-economic conditions, to the cultural and educational projects of each band and to the way in which they were mingled with non-indigenous communities. He also stressed the finite number of members of each band, and the fact that each of them applied strict membership criteria similar to those found in the *Indian Act*, so that the FNI claim was not "an open-ended claim made on behalf of a potentially unlimited number of persons."⁶⁸ He even noted that the FNI, with federal funding, conducted an "institutional framework project" that outlined in detail the steps already taken by the FNI bands to organize on a voluntary basis and how this organization could be further developed after federal recognition. Thus, his report emphasized characteristics of the FNI members that are usually considered typical of indigenous communities, and more specifically of First Nations governed by the *Indian Act*.

Nevertheless, Professor Lyon's report contained the seed of one striking feature of the regime that would be put in place a decade later. He noted that most of the communities other than Conne River (and perhaps Glenwood) would not be suited for the creation of *Indian Act* reserves:

What struck me most forcefully at the end of my visits to FNI member communities was the inappropriateness of the *Indian Act* to their situations,

⁶⁶ *Ibid.* at 4.

⁶⁷ *Ibid.* at 9.

⁶⁸ *Ibid.* at 10.

with the possible exception of Glenwood. That situation is a product of considerable intermarriage with non-natives, going back over a very long time, and extensive integration with non-native communities. It was the relative absence of these factors at Conne River that made recognition under the *Indian Act* acceptable to the federal government.⁶⁹

He thus suggested that the federal government recognize the FNI bands as “legitimate Mikmaq communities,” but that the *Indian Act* model should not be imposed on them. Rather, he invited the parties to enter into negotiations that would lead to an original form of self-government, better suited to the circumstances of the Newfoundland Mi’kmaq. In other words, Canada’s indigenous peoples do not find themselves in identical circumstances and the same legal regime may not be appropriate throughout the country. In particular, the reserve system would not be appropriate to govern mixed communities, especially in the urban context.

The negotiations that began shortly thereafter and that intensified in 2003 picked on that idea. In an agreement reached in late 2007, the federal government agreed to create one “landless band” encompassing all Mi’kmaq individuals (except Miawpukek members) on the island of Newfoundland.⁷⁰ That band, called the Qalipu Mi’kmaq First Nation band, would be governed by the *Indian Act*, but no reserve would be created for it. That means that the Qalipu band will not exercise any jurisdiction of a territorial nature, such as the powers provided for in section 81 of the *Indian Act*. It will rather focus on the provision of services to its members. Qalipu members will be eligible for the benefits afforded directly by the federal government to status Indians irrespective of their residence on or off a reserve, such as non-insured health benefits and post-secondary education support. However, they will not be entitled to the rights that depend on residence on a reserve, such as the tax exemption in section 87 of the *Indian Act* or certain federal funding programs that are only available to First Nations possessing a reserve.

The agreement provided for a registration process whereby persons of Canadian Indian ancestry who were members of a Newfoundland Mi’kmaq community in 1949, or their descendants, may apply for enrolment. The agreement provides a non-exclusive list of 36 such communities. While it was expected that about 10,000 persons would enroll, a much greater number of persons applied and the Qalipu band was officially created by order-in-council on 22 September 2011 with 21,429 members.⁷¹ The initial registration process is still in progress.

The process that led to the recognition of the Qalipu band shows how similarity and difference are invoked in order to support claims based on the right to equality. While the

⁶⁹ *Ibid.* at 21.

⁷⁰ The agreement may be found at <http://qalipu.ca/site/wp-content/uploads/2011/07/2011sept-Agreement-In-Principle.pdf> (accessed 5 January 2014).

⁷¹ *Qalipu Mi’kmaq First Nation Band Order*, SOR/2011-180, on line: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2011-180/FullText.html> (accessed 5 January 2014); *Order Amending the Qalipu Mi’kmaq First Nation Band Order*, SOR/2011-181, on line: <http://www.gazette.gc.ca/rp-pr/p2/2011/2011-10-12-s1/html/sup2-eng.html> (accessed 5 January 2014).

initial actions of the federal government tended to paint the FNI as lacking the cultural and organizational features of genuine Indian bands or First Nations, and therefore doomed to remain on the lower rung of the official classification of the indigenous peoples, the FNI was able to impose the idea that the appropriate comparison was with status Indians and not with non-status individuals elsewhere in the country. Thus, it was able to secure a place in the category that is associated with the largest bundle of rights and benefits. However, this admission among the status Indians came at a price: the reconfiguration of that category through the new concept of the “landless band,”⁷² which carries lesser benefits than a band with a reserve.⁷³ Moreover, the courts of the province have so far denied that the Mi’kmaq enjoy aboriginal rights, which makes for a further differentiation with First Nations in other provinces or territories.⁷⁴

Thus, what was viewed as an anomaly is now a new sub-category in the official classification. Whether this will serve as precedent for groups elsewhere in the country (for instance, urban indigenous groups) remains to be seen.

E. THE LABRADOR MÉTIS NATION/NUNATUKAVUT

The last indigenous group to seek political and legal recognition in Newfoundland and Labrador is the Labrador Métis Nation, which was created in 1985. As mentioned earlier, groups of mixed ancestry formed in Labrador as a result of the arrival of European men. However, those “Settler” or “Inuit-Métis” communities were more visible in northern Labrador. Persons of mixed ancestry in southern Labrador were subjected to greater assimilative pressures and their identity was often hidden from outsiders. Moreover, when the “designated communities” system was put in place after Confederation, only northern communities were designated, reflecting and reinforcing the view that there were no indigenous peoples in southern Labrador. Yet, as one observer noted, the latter “had just as much Inuit blood and shared a similar way of life”⁷⁵ as their northern counterparts, begging the question of who the appropriate comparator group is.

The Labrador Métis Nation was formed in 1985 by persons of mixed ancestry in southern Labrador who chose to reassert their indigenous identity. As Professor Kennedy notes, for those people “pride and interest in one’s roots have replaced stigma and shame.”⁷⁶ Initially, the group was met with challenges to its indigeneity and accusations of opportunism. While one could assume that the group would at most be classified in the

⁷² We should note that the concept of landless band was not truly new. However, up to that date, a landless band was seen more as an anomaly than as a principled policy option. See, e.g., *Micmac Nation of Gespeg v. Canada (Minister of Indian and Northern Affairs)*, [2008] 1 C.N.L.R. 65 (F.C.); aff’d 2009 FCA 377.

⁷³ This choice caused a split within the FNI, leading to the creation of a parallel organization called K’takamkuk Mi’kmaq Alliance, whose legal action was dismissed mainly on procedural grounds: *Davis v. Canada (A.G.)*, [2009] 1 C.N.L.R. 1 (N.L.C.A.).

⁷⁴ *Supra*, note 53.

⁷⁵ Bill Rompkey, *supra* note 34, at 155.

⁷⁶ John C. Kennedy, *supra* note 23, at 17.

“lowest” category of indigenous peoples (non-status Indians and Métis), it was successful in asserting its identity, to the point that it may possibly claim status as Inuit.

Indeed, the LMN affiliated with the Native Council of Canada, which became the Congress of Aboriginal Peoples, the association that represents non-status and off-reserve indigenous peoples. Under that umbrella, it participated in certain federal programs, especially in the field of labour market training, that were designed to apply to all indigenous peoples across the country, irrespective of status.⁷⁷ Moreover, it recently changed its name for Nunatukavut Community Council, a name that underscores the Inuit roots of its distinctive identity.

The LMN was also successful in persuading the Royal Commission on Aboriginal Peoples of its indigenous identity. In its 1996 report, the Commission stated:

Certainly, the Labrador Métis community exhibits the historical rootedness, social cohesiveness and cultural self-consciousness that are essential to nationhood, and they are developing a political organization that will allow them to engage in effective nation-to-nation negotiation and to exercise self-government. While the way of life of the Labrador Métis is very similar to that of Labrador Inuit and Innu, the Métis culture is sufficiently distinct to mark them as a unique people, and in our view they are likely to be accorded nation status under the recognition policy we propose.⁷⁸

This represented a powerful endorsement, as the Commission refused to give an opinion on the situation of Métis groups other than the Métis Nation of the West and the Métis of Labrador. The Commission’s explicit reference to the Labrador Métis was also noted by the Supreme Court of Canada in the *Powley* case, in which the LMN was an intervenor.⁷⁹

However, the most interesting aspect of LMN’s identity claims is its application to the courts of the province for the recognition of the provincial government’s duty to consult them before undertaking the construction of the Trans-Labrador highway.⁸⁰ Under the framework laid out by the Supreme Court in the *Haida Nation* case,⁸¹ an indigenous group need only bring prima facie evidence of an aboriginal right in order to trigger the government’s duty to consult. The province’s Court of Appeal decided to apply this principle not only to the proof of the aboriginal right, but also to the issue of the indigenous identity of groups who do not have Indian status. Thus, the LMN asserted that it had Inuit aboriginal rights or, in the alternative, Métis aboriginal rights. As the judge remarked:

⁷⁷ John C. Kennedy, *supra* note 23, at 16.

⁷⁸ Royal Commission on Aboriginal Peoples, *Report*, vol. 4, *Perspectives and Realities*, section 1.3, online: http://www.collectionscanada.gc.ca/webarchives/20071124130236/http://www.ainc-inac.gc.ca/ch/rcap/sg/sjm5_e.html (accessed 5 January 2014).

⁷⁹ *R. v. Powley*, [2003] 2 S.C.R. 207 at para. 10.

⁸⁰ *Newfoundland and Labrador v. Labrador Métis Nation* (2007), 288 D.L.R. (4th) 641 (N.L.C.A.).

⁸¹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

While presenting their claim as beneficiaries of Inuit aboriginal rights, the [LMN] say it is possible that, as a matter of law, their claim may eventually be founded upon Métis rights. They submit, however, that they need not definitively take a position, at this stage, as to whether they are Inuit or Métis, saying that this will ultimately be determined by the courts, as a matter of law, once the essential facts have been established. For now, say the respondents, in order to trigger a duty on the Crown to consult with them, they need only establish a credible claim as aboriginal people.⁸²

Probably as a result of that case, the LMN was included in the consultation process dealing with the Lower Churchill hydroelectric dam project. While that process gave rise to litigation, this time no one contested the indigenous identity of the LMN members.⁸³

Whether the LMN will be successful in negotiating a land claims agreement or other forms of official recognition remains to be seen. From our perspective, the question that remains open is which comparison will be successful: are the LMN members similar to the Inuit or to Métis? The answer will likely determine the bundle of rights that they will secure.

IV. Conclusion

In 1949, applying equality, in its formal conception, was simple: no one in Newfoundland was to be granted Indian status, and everyone would be treated equally. More than 60 years later, substantive equality has been a driving force in the emergence of a mosaic of indigenous groups. Paradoxically, however, each group has secured different types of status and different rights and benefits.

In the process, groups seeking recognition claimed equal treatment by drawing comparisons with already recognized groups elsewhere in the country or within the province. They asserted “sameness in difference,” rather than attempting to show that their own difference from non-indigenous society is in and of itself a ground for specific rights. And this search for the appropriate comparator had profound implications for the political organization of the indigenous peoples of the province, as certain groups split from organizations that included other groups that were considered of dubious indigenous identity by mainstream society. If the Supreme Court wants to downplay the importance of comparator groups in the application of the right to equality, the real-life experience studied above suggests that comparison remains the most intuitive manner of seeking equal treatment.

Whether this outcome should be celebrated or decried is a difficult issue. Advocates of equality will be uncomfortable with a situation where various indigenous groups end up

⁸² *Newfoundland and Labrador v. Labrador Métis Nation* (2007), 288 D.L.R. (4th) 641 (N.L.C.A.) at para. 8.

⁸³ *Nunatukavut Community Council Inc. v. Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy)*, 2011 NLTD 44.

with very different bundles of rights and financing, unless this disparity can be justified by the different needs and circumstances of each.⁸⁴ As mentioned in Part I, whether such justification exists is difficult to measure. Identity does not lend itself to easy comparisons. But a critical observer would note that whatever comparisons won the day in Newfoundland and Labrador were likely based on non-indigenous perceptions about the degree of authenticity of each group's indigenous identity, as well as purely contingent factors such as a group's political bargaining position, timing and sheer luck. And indeed, there does not seem to be any obvious reason why northern and southern Settlers are treated differently, or why Miawpukek has a reserve and Qalipu does not.

On the positive side, we may note that the official recognition of status and the obtaining of at least certain rights is a valuable achievement for groups who were previously dismissed as inauthentic. Qalipu is better off as a landless band than unrecognized. And the prospect of having to grant only a limited bundle of rights to groups who are currently without status might facilitate their recognition by governments who are wary of the consequences for the public purse. As recent Supreme Court cases suggest that there is little willingness on the part of the courts to scrutinize the disparities between the status and rights of different indigenous groups,⁸⁵ political resolution based on more or less intuitive comparisons and differential rights may be the best that unrecognized indigenous groups can hope for in the foreseeable future.

Nevertheless, the current situation is unsatisfactory, especially when we consider the number of indigenous groups in other parts of Canada that are claiming some form of recognition.⁸⁶ The lack of a principled framework for the resolution of these claims does not guarantee any form of consistent treatment and leaves the rights of many groups to be decided by contingent factors. One hopes that serious consideration will one day be given to the recommendation issued by the Royal Commission on Aboriginal Peoples more than fifteen years ago, to set up a specialized body tasked with assessing claims for recognition against a common standard.⁸⁷

⁸⁴ Indeed, the Supreme Court indicates that distinctions may be compatible with the right to equality if they "correspond" to the characteristics or circumstances of the claimant: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 537-539, paras. 69-71; *Withler v. Canada (A.G.)*, [2011] 1 S.C.R. 396 at 428, para. 76.

⁸⁵ *Lovelace v. Ontario*, [2000] 1 S.C.R. 950; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 S.C.R. 670.

⁸⁶ See, e.g., Robert K. Groves, "The Curious Instance of the Irregular Band: A Case Study of Canada's Missing Recognition Policy" (2007) 70 Sask. L. Rev. 153.

⁸⁷ Royal Commission on Aboriginal Peoples, *Report*, vol. II, *Restructuring the Relationship* (Ottawa: Canada Communications Group, 1996), recommendation 2.3.27; see also Paul L.A.H. Chartrand, "The 'Race' for Recognition: Toward a Policy of Recognition of Aboriginal Peoples in Canada" in Louis A. Knafla and Haijo Westra, eds., *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (Vancouver: UBC Press, 2010) 125. It must be noted, however, that a similar system in the United States has been the subject of criticism: Mark E. Miller, *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgement Process* (Lincoln: University of Nebraska Press, 2004); Renée A. Cramer, *Cash, Color and Colonialism: The Politics of Tribal Acknowledgement* (Norman: University of Oklahoma Press, 2005).

